Filed 5/12/10 In re Yancy CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re JAMES M. YANCY on Habeas Corpus.	G042045 (Super. Ct. Nos. M-10334, M-11040, M12167, & 12408) O P I N I O N

Original proceeding; petition for a writ of habeas corpus to challenge orders of the Superior Court of Orange County, Thomas M. Goethals, Judge. Petition granted in part and denied in part.

James M. Yancy, in pro. per.; Deborah A. Kwast, Public Defender, Dinah A. Granafei, Deputy Public Defender; and Lewis A. Wenzell, under appointment by the Court of Appeal, for Petitioner.

Edmund G. Brown, Jr., Attorney General, Bradley A. Weinreb, Deputy Attorney General; Tony Rackauckas, District Attorney and Stephan Sauer, Deputy District Attorney, for Real Party in Interest.

* * *

Petitioner James M. Yancy filed a petition for a writ of habeas corpus, in propria persona, alleging his confinement under the Sexually Violent Predator Act (SVPA; Welf. & Inst. Code, § 6600 et seq.; unless specified, all further statutory references are to this code) has been, for several reasons, unlawfully extended beyond the expiration of his initial commitment. We invited both the People and petitioner's trial counsel, the Orange County Public Defender, to file informal responses. After receiving their responses, we issued an order to show cause and appointed counsel to represent petitioner in this proceeding. We shall deny petitioner's request to dismiss the two current recommitment proceedings. But we agree he is entitled to be reevaluated concerning his status as a sexually violent predator (SVP), a new probable cause hearing in each case, expedited resolution of the pending recommitment proceedings, and a hearing on his ineffective assistance of counsel claim.

FACTS AND PROCEDURAL BACKGROUND

On October 24, 2002, a jury found petitioner to be a SVP and the trial court ordered him committed to the Department of Mental Health for two years. (*People v. Yancy* (Super. Ct. Orange County, 2002, No. M-8476).) Petitioner appealed the decision but we affirmed it (*People v. Yancy* (Apr. 21, 2005, G032933) [nonpub. opn.]), and the California Supreme Court denied his petition for review.

The Orange County District Attorney filed a petition seeking to recommit petitioner as a SVP for an additional two years on October 14, 2004. (*People v. Yancy* (Super. Ct. Orange County, 2004, No. M-10334).) Four days later, petitioner signed a document in which he stated "I . . . have received a copy of the [p]etition . . . to recommit me for another two[-]year interval," that he had discussed the matter with "[m]y attorney," Deputy Public Defender David Scharf, and that it was petitioner's "express[] wish[] not to be transported" to Orange County "for the purpose of being

arraigned . . . and [he] would waive any and all rights to be present . . . for the arraignment, a [section] 6601.5 urgency probable cause hearing, and the right to have my probable cause hearing under . . . [section] 6602 held within 10 days of the arraignment."

Petitioner also stated, "I am waiving my appearance in court knowingly, voluntarily and intelligently." A social worker witnessed petitioner's execution of the document. Scharf also submitted a declaration corroborating his telephone conversation with petitioner and that his client's desire to "waive his presence . . . for the purpose" of the foregoing hearings was knowing, voluntary, and intelligent.

Hearings on this recommitment petition were set and continued throughout the remainder of 2004 and in 2005 and 2006. Members of the Public Defender's office appeared for petitioner, waiving his presence. Several of the hearings were continued by the stipulation of the parties, while in some instances only petitioner's counsel moved to continue the matter. The court clerk forwarded minute orders for nearly all of the hearings to the state hospital where petitioner was being confined.

On October 12, 2006, the Orange County District Attorney filed a second recommitment petition against petitioner. (*People v. Yancy* (Super. Ct. Orange County, 2006, No. M-11040).) In light of recent amendments to the SVPA, the district attorney sought recommitment for an "indeterminate term." Petitioner, again witnessed by a social worker, executed a declaration identical to the one prepared for the first recommitment petition, except it stated petitioner was now represented by Deputy Public Defender Dinah Granafei. In turn, Granafei signed a declaration identical to that signed by Scharf stating she had discussed petitioner's waiver of his appearance and believed he had made it knowingly, voluntarily, and intelligently.

The same day, petitioner and the social worker signed a document prepared by the district attorney's office that provided as follows: "I, James Yancy, . . . am represented by Dinah Granafei in this action. I have been advised of the right to be present at all stages of the proceedings. With full knowledge and understanding of this

right, I hereby waive the right to be present at these proceedings, including but not limited to presentation of arguments on questions of law, when a continuance is ordered, when the case is set for trial, at hearings on any motion, or any other matter as may arise in this action. I hereby declare that my attorney and I will determine when I will be present for any part of this civil proceeding. [¶] In waiving my presence, I hereby authorize my attorney to appear on my behalf and represent my interest in this action. I request that the court proceed in my absence, as if I were personally present. Furthermore, I will consider notice to my attorney and [her] presence in court at the proper time to be sufficient notice to me of the requirements of appearance at the proper time and place."

In January 2007, the court held a hearing in both cases and found probable cause existed to believe petitioner was likely to engage in sexually violent predatory behavior if released and ordered him kept in custody pending trial on each petition. The clerk forwarded copies of the minute order in each case to Coalinga State Hospital where petitioner was being held. At a May 2007 pretrial hearing in each case, the matters were continued until September 14 at the request of the defense. On the latter date, each matter was again continued to February 2008.

In October 2007, petitioner filed a motion in propria persona seeking "to dismiss the instant recommitment proceedings," claiming "the statutory authorization for such proceedings . . . was amended" in such a manner to "eliminate[] the authorization for extending commitments of persons for two year-periods . . . ." He argued the new law, "which became effective on September 20, 2006, repealed the sole authorization for extending the commitment of a person committed for two years under the previous version of the law. The amended act does not apply retroactively and its provisions do not apply to a person who is not in the custody of the Department of Corrections serving a prison term or parole revocation. [Petitioner] is, therefore, not subject to further

proceedings under the Act." The court denied the motion on the ground that since petitioner was represented by an attorney, he needed to proceed through counsel.

Thereafter, several pretrial hearings were set in each case. Each time, the hearing of each petition was continued either at the request of the defense or by stipulation of the parties.

In October 2008, petitioner, again in propria persona, filed a petition for a writ of habeas corpus in the superior court. (*In re Yancy* (Super. Ct. Orange County, 2008, M-12167).) He claimed the California Department of Mental Health "failed . . . to [i]mplement, [u]tilize, or [e]nforce . . . a valid 'Standardized Assessment Protocol' . . . in substantive compliance . . . with [the] California[] Administrative Procedures Act" and, the failure to do so "invalidates the [p]etition for [c]ommitment" and "necessitates dismissal of the petition and release of [p]etitioner from [i]nvoluntary confinement."

In April 2009, petitioner filed a second habeas corpus petition. (*In re Yancy* (Super. Ct. Orange County, 2009, M-12408).) This petition alleged four grounds for relief. First, he claimed the "district attorney fail[ed] to file for extended commitment prior to the expiration date of the initial commitment." Second, he again cited the Department of Mental Health's failure to adopt the assessment protocol in compliance with the Administrative Procedures Act. Third, petitioner argued "excessive [pretrial] delay . . . violate[d] . . . procedural due process . . . ." Finally, he asserted ineffective assistance of counsel. Petitioner attached a declaration stating he "has never been provided notice of any extended petition prior to the expiration of [the] initial commitment" nor "agreed to any public defender . . . waiv[ing] time . . . ."

On April 24, the superior court issued orders denying both petitions. In case number M-12167, the court held "[t]he petition does not set forth a claim of error that is subject to review by way of habeas corpus" because the initial SVP finding "was affirmed and became final in 2005" and even though the "evaluation protocol employed by the Department of Mental Health was invalidated by the Office of Administrative

Law . . . as an underground regulation, the use of an invalidated protocol did not deprive the trial court of fundamental jurisdiction," the only basis available for a collateral attack on the original commitment judgment.

In case number M-12408, the court ruled "[t]he issues raised . . . are not subject to review by way of habeas corpus" because "[p]etitioner has an adequate remedy at law" by "mov[ing] for dismissal of the recommitment petitions" and asking "the trial court to address" the claim of ineffective assistance of counsel.

DISCUSSION

The current proceeding began with petitioner, again in propria persona, seeking release from custody by a habeas corpus petition filed in this court. He alleged four grounds for relief. First, that he "is unlawfully restrain[ed] . . . because [the] district attorney fail[ed] to file for [an] extended commitment prior to the expiration date of the initial commitment." Second, since the California Department of Mental Health failed to adopt SVP assessment protocols in compliance with the Administrative Procedures Act, "any evaluations[]by DMH evaluators for extended commitment . . . were . . . void and violate procedural due process." Third, citing the pretrial delay, petitioner claimed "[t]he district attorney has failed to bring [him] to trial since October 24, 2002," he "never agreed to [the] delay," and thus he "has . . . experienced an extended confinement without any determination that he was an SVP under any present petition." Finally, in a supporting declaration petitioner asserts he has received ineffective assistance of counsel.

After issuing an order to show cause, we appointed counsel to represent petitioner. Counsel filed a supplement to the petition asserting three grounds. The first and second claims, void "probable cause hearings regarding the two [extended commitment] cases . . . because invalid protocols were used" and that "[t]he current [extended recommitment] proceedings . . . should be dismissed because of delay," repeat

the second and third contentions of the original petition. The supplemental petition's third ground, that petitioner's "[d]efense counsel [in the superior court] rendered ineffective assistance of counsel by failing (or refusing) to make a motion[] to dismiss the pending cases," repeats the original petition's fourth ground.

1. Failure to Timely File Recommitment Petitions

Petitioner's claim the district attorney failed to timely file petitions to extend his SVP commitment is clearly incorrect. On October 14, 2004, the district attorney filed a petition seeking to extend petitioner's confinement for another two years. Then, on October 12, 2006, the district attorney filed another petition to extend his confinement for an indeterminate term under the SVPA's recent amendments.

Petitioner asserts, he "is unaware [of] what has happened" following the initial October 2002 SVP finding "because he has not received any copies of recommitment petition[s] . . . ." This statement is contradicted by the record. After the filing of each recommitment petition, he signed a statement, witnessed by a social worker, that acknowledged his receipt of each petition. On each occasion, petitioner spoke with appointed counsel. Finally, court records reflect the clerk routinely sent copies of the minute order from the various hearings in both proceedings to the state hospitals where petitioner was confined. (Evid. Code, § 664 [official duty presumed to have been regularly performed].)

The only contrary support in the record is petitioner's conclusory statement in a supporting declaration asserting he "has never been provided notice of any extended petition prior to the expiration of [his] initial commitment . . . ." In light of the record before us, this statement is insufficient to support a claim the district attorney failed to timely file SVP commitment extension petitions.

2. Excessive Pretrial Delay

The record reflects extensive pretrial delays have occurred in both recommitment proceedings. The SVPA does not contain a requirement for when trial on a recommitment petition must be held (*Litmon v. Superior Court* (2004) 123 Cal.App.4th 1156, 1170-1171), but cases have recognized "'the "fundamental requirement of due process"—"the opportunity to be heard 'at a meaningful time and in a meaningful manner'"'" applies in this context. (*People v. Litmon* (2008) 162 Cal.App.4th 383, 396.) Thus, it imposes an obligation on "the trial court [to] ensure the matter proceeds to trial within a reasonable time . . . ." (*Orozco v. Superior Court* (2004) 117 Cal.App.4th 170, 179.)

In *People v. Litmon, supra*, 162 Cal.App.4th 383, the court held "[t]he ultimate responsibility for bringing a person to trial on an SVP petition at a 'meaningful time' rests with the government." (*Id.* at p. 406.) Nonetheless, courts have also recognized "failure to *complete the trial* on a subsequent petition before the expiration of the *prior* commitment period does not divest the trial court of jurisdiction to proceed on the subsequent petition for commitment [citation]; that the failure to *obtain a recommitment order* on the second/subsequent petition before the expiration of the *underlying second commitment term* does not divest the court of jurisdiction [citation]; and that delaying trial on a recommitment petition beyond the two years of the underlying commitment term does not violate the SVP's due process rights where the SVP or the SVP's attorney is responsible for the delays [citation]." (*Litmon v. Superior Court, supra,* 123 Cal.App.4th at p. 1171; see also *Orozco v. Superior Court, supra,* 117 Cal.App.4th at p. 179 ["the delay herein did not deprive the trial court of jurisdiction to proceed on either petition"].)

Thus, in determining if "the delay[s at issue in this case] violated [petitioner's] right to due process," we must consider whether "[t]he record reflects the delay in bringing the matter to trial was attributable to [petitioner's] counsel and/or to

[petitioner] himself." (*Orozco v. Superior Court*, *supra*, 117 Cal.App.4th at p. 179.) Here, the record reflects the actions of petitioner and his attorney at least contributed to the delays in each case.

After the district attorney filed each recommitment petition, petitioner declined to be transported to Orange County for the proceedings, waived his right to appear in person in each case, authorized the public defender's office to represent him at all hearings in his absence, and even waived the time requirements for conducting the initial probable cause hearings. Thereafter, the court clerk sent copies of the minute orders summarizing the hearing in each case, which reflected the numerous continuances and reasons for them, to the state hospital where petitioner was confined.

Before the April 2009 habeas corpus petition (case No. M-12408) petitioner did not object to the delays in either case. Petitioner's present counsel claims he complained about the delays in his October 2008 habeas corpus writ petition (case No. M-12167). This assertion is incorrect. That petition sought dismissal of the recommitment proceedings solely because of the 2006 amendments to the SVPA. Consequently, this case is distinguishable from *People v. Litmon*, *supra*, 162 Cal.App.4th 383 and *Litmon v. Superior Court*, *supra*, 123 Cal.App.4th 1156 where the committees repeatedly objected to the delays in hearing their cases.

3. Use of the Invalid SVP Assessment Protocols

Under the Administrative Procedure Act (APA; Gov. Code, § 11340 et seq.), "[n]o state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation . . ., unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed . . . pursuant to this chapter" (Gov. Code, § 11340.5, subd. (a)).

The APA grants the Office of Administrative Law (OAL; Gov. Code, § 11340.2, subd. (a)) the authority to "determine[e] . . . whether [a] guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a regulation . . . ." (Gov. Code, § 11340.5, subd. (b).) "A regulation found not to have been properly adopted is termed an 'underground regulation.' '"An underground regulation is a regulation that a court may determine to be invalid because it was not adopted in substantial compliance with the procedures of the [APA].'" [Citations.] An OAL determination that a particular guideline constitutes an underground regulation is not binding on the courts, but it is entitled to deference. [Citations.]" (*People v. Medina* (2009) 171 Cal.App.4th 805, 813-814.)

In 2008, the OAL concluded the standardized assessment protocol employed by the Department of Mental Health to evaluate persons alleged to be sexually violent predators had not been properly adopted. (*In re Ronje* (2009) 179 Cal.App.4th 509, 515.) In *Ronje*, we agreed with the OAL's conclusion and held "[a]s an underground regulation, the 2007 standardized assessment protocol is invalid. [Citation.]" (*Id.* at p. 517.)

It is unclear whether petitioner's arguments are limited to the current proceedings or includes his original SVP commitment. To the extent he attacks the original SVP judgment, it constitutes "a collateral attack on the initial judgment of commitment, which became final . . . years ago," and "[t]he cognizable grounds for such an attack are restricted to a lack of jurisdiction, since a judgment within the court's jurisdiction can be attacked only directly through appeal. [Citations.]" (*People v. Medina, supra,* 171 Cal.App.4th at p. 815, fn. omitted.) In *Ronje*, we concluded "[u]se of the evaluations based on the invalid assessment protocol, though erroneous, does not deprive the trial court of fundamental jurisdiction over the SVPA commitment petition. The trial court has the power to hear the petition notwithstanding the error in using the invalid assessment protocol. Dismissal therefore is not the appropriate remedy." (*In re*

Ronje, supra, 179 Cal.App.4th at p. 518.) Thus, any attack on the original commitment lacks merit.

As for the two pending recommitment petitions, *Ronje* also recognized the appropriate remedy is "to (1) order new evaluations . . . using a valid assessment protocol, and (2) conduct another probable cause hearing under section 6602, subdivision (a) [of the SVPA] based on those new evaluations." (*In re Ronje, supra,* 179 Cal.App.4th at p. 519.) Real Party in Interest acknowledges this is the appropriate remedy in its return.

4. Ineffective Assistance of Trial Counsel

Both the original and the supplemental petitions allege ineffective assistance of counsel based on trial counsel's failure to object to the delay in the proceedings and refusal to move to dismiss the recommitment petitions.

"To demonstrate ineffective assistance of counsel, a defendant must show that counsel's action was, objectively considered, both deficient under prevailing professional norms and prejudicial. [Citation.]" (*People v. Hinton* (2006) 37 Cal.4th 839, 876.) The burden of establishing these elements is on the defendant. (*People v. Lucas* (1995) 12 Cal.4th 415, 436.)

Here, the record is not adequate for us to decide the merits of petitioner's ineffective assistance of counsel claim. As respondent notes, his appointed counsel "continually waived his presence and asked for or stipulated to continuances" without any objection being asserted by defendant before April 2009. Since the record fails to shed light on why petitioner's trial counsel acted in this manner, we must reject the claim. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.)

However, since we are granting the petition with directions to conduct new probable cause hearings in the pending recommitment proceeding, we shall deny his request for relief on the ground of ineffective assistance of counsel "without prejudice to

a similar motion being made in the superior court if . . . [petitioner] desire[s] to further urge the matter." (*In re Baker* (1988) 206 Cal.App.3d 493, 498.)

DISPOSITION

The order to show cause is discharged. The petition, insofar as it seeks dismissal of the recommitment proceedings, is denied. The superior court is directed to forthwith order new evaluations of petitioner using valid assessment protocols and set new probable cause hearings in both pending recommitment proceedings. In the event the court finds probable cause exists that petitioner remains a sexually violent predator, the matters are to be set for trial at the earliest possible date. In addition, if petitioner so requests, the superior court shall conduct a hearing on whether he has been denied the effective assistance of counsel in these proceedings and, if so, what remedy would be appropriate under the circumstances.

RYLAARSDAM, J.

WE CONCUR:

SILLS, P. J.

IKOLA, J.